Gundy and the Civil-Criminal Divide

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INTRODUCTION

It could have been the case that declared "most of Government . . . unconstitutional," by reviving a robust application of the doctrine that prohibits Congress from delegating its law-making power to the other branches.[1] At least that is what many awaiting the Court's widely-anticipated 2019 decision in *Gundy v. United States* believed, after the Court agreed to hear Gundy's claim that "Congress unconstitutionally delegated legislative power when it authorized the Attorney General to 'specify the applicability' of [the federal Sex Offender Registration and Notification Act]'s registration requirements to pre-Act offenders."[2] This includes, no doubt, the editors of this journal, when they chose *Gundy* (before the decision) as the subject of the yearly "Term Paper" on a significant Supreme Court case.

In the end, *Gundy* said little new about the nondelegation doctrine. This essay follows the Court's lead and says little about nondelegation. Instead, it considers another, equally significant aspect of the interpretation of sex offender registration acts (SORAs): whether they, and other similar laws and regulations that purport to be civil nonpunitive approaches to regulating behavior and protecting the public, instead actually impose punishment and should be characterized as criminal rather than civil. This characterization is significant, because a number of constitutional protections—including the right to counsel, to a jury trial where the burden of proof is beyond a reasonable doubt, and to the privilege against self-incrimination—are mandated in criminal cases.[3] Thus, while many consequences related to criminal convictions might appear and feel quite punitive in nature, this essay focuses on the more binary (although, as explored below, not neatly divided) doctrinal

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[1] Gundy v. United States, No. 17-6086, slip op. at 17 (U.S. June 20, 2019). The nondelegation doctrine derives from Article I, §1 of the Constitution, which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," U.S. CONST. art. I, § 1, and "is rooted in the principle of separation of powers that underlies our tripartite system of Government." Mistretta v. United States, 488 U.S. 361, 371 (1989).

[2] *Gundy*, slip op. at 4.

[3] U.S. CONST. amends. V, VI; *In re* Winship, 397 U.S. 358 (1970); Gideon v. Wainwright, 372 U.S. 335 (1963).

determination that a particular consequence is a criminal punishment rather than a civil consequence.[4] In addition to SORAs, there are a large and growing number of so-called collateral consequences of criminal convictions. These include quite drastic consequences, such as deportation, loss of public housing and financial aid, and barriers to occupational licensing and employment, that often overshadow any direct sanction imposed in the criminal case.[5] Although some of these consequences are directly based on or closely linked to an underlying criminal conviction, courts have frequently characterized them as nonpunitive and thus civil under existing doctrinal tests.[6]

But things are starting to change. There is recent research about whether particular consequences actually advance—or instead undercut—the purportedly nonpunitive public safety rationales upon which so many of them rest. There are also advances in technology and the delivery of information about criminal records that render an individual's experience of the "collateral" consequences of a criminal conviction altogether different, and harsher, than previously. Drawing on these and other changing realities, some courts have recently placed more consequences on the criminal side of the line.[7]

Although reassessment of the civil-criminal line is already happening in the lower courts, this issue could also resurface in a future nondelegation case—and nondelegation is something the Supreme Court may well revisit soon. Thus, a brief word on *Gundy* and then on its connection to the civil-criminal line. In *Gundy*, the four-Justice plurality took a somewhat tortured view of the meaning of Congress' words in the federal SORNA section that delegated "the authority to specify the applicability of the requirements of this subchapter [of SORNA] to sex offenders convicted before the enactment of this chapter" to the Attorney General.[8] Finding that the law's "text, considered alongside its context, purpose, and history," gave the Attorney General discretion to determine only how and when (but not whether) it would be feasible to apply SORNA to those convicted before the act was effective, the plurality held that Congress also provided appropriate guidance for the exercise of that discretion and thus did not violate the nondelegation doctrine.[9] The *Gundy* plurality did not disturb nondelegation doctrine as set out in cases from the 1930s.

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[4] This essay uses the terms civil-criminal and nonpunitive-punitive interchangeably, and in reference to the doctrinal line that separates civil nonpunitive consequences from criminal punitive ones (while recognizing that many purportedly nonpunitive consequences look and feel punitive). The distinction between collateral and direct consequences is another relevant doctrinal line, similar to the civil-criminal line.

[5] *See infra* notes 34–35, and accompanying text.

[6] *See infra* notes 26–33.

[7] *See infra* Parts II, III.

[8] 34 U.S.C. § 20913(d) (2006).

[9] *Gundy*, slip op. at 6.

Herman Gundy lost and "most of Government" survived, with only eight Justices taking part in the decision and a reluctant concurrence by Justice Alito.[10] However, a full Court may soon return to the issue of nondelegation given Justice Alito's open invitation to do so in his *Gundy* concurrence and a widely-predicted fifth vote from Justice Kavanaugh to reconsider the current approach.[11]

Should that happen, one choice the Court may confront is whether it should treat delegation in the criminal law context differently from delegation in the civil law context. This picks up on a suggestion in Justice Gorsuch's dissent in *United States v. Nichols*, written shortly before he joined the Supreme Court, that courts might use a particular—and particularly demanding—nondelegation test "when the criminal law is involved."[12] Although it is far from clear how and when the Court might approach a future nondelegation case, a rule specific to criminal laws makes good sense, as Wayne Logan has suggested in another term paper in this volume and in prior writings, given the liberty interests involved and relative lack of technical complexities in criminal law.[13] As Logan also notes, such an approach might force the Court to address long-standing and challenging issues about the line between civil and criminal sanctions.[14]

That brings things back to this essay saying little about nondelegation. Separate and apart from a delegation doctrine specific to criminal law, today—or in the near future—how might the Court distinguish between a civil (nonpunitive) and criminal (punitive) statute or regulation? Although the Court has answered that question before, it has done so in different ways and varying contexts. There is reason to expect that the Court might approach things differently (more coherently?) yet again. In addition to much-needed clarity in the "conceptually muddled" body of doctrine about the line between punitive and nonpunitive consequences that lower courts grapple with in different contexts,[15] reassessment of where consequences belong on the civil-criminal line is particularly timely. A rapidly increasing number and

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[10] *Gundy*, slip op. at 1 (Alito, J., concurring) ("[B]ecause a majority is not willing to [reconsider its approach to the nondelegation doctrine], it would be freakish to single out the provision at issue here for special treatment.").

[11] *Gundy*, slip op. at 1 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach [to nondelegation] we have taken for the past 84 years, I would support that effort."); s*ee also* Jeannie Suk Gersen, *The Supreme Court is One Vote Away from Changing How the U.S. is Governed*, THE NEW YORKER (July 3, 2019) https://www.newyorker.com/news/our-columnists/the-supreme-court-is-one-vote-away-from-changing-how-the-us-is-governed.

[12] United States v. Nichols, 784 F.3d 666, 672 (10th Cir. 2015).

[13] Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 115 n.367 (2008).

[14] Wayne A. Logan, Gundy v. United States: *Gunning for the Administrative State*, 17 Ohio St. J. Crim. L. 185 (2019).

[15] Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 781 (1997).

variety of actors use criminal records in a broad range of decision-making functions, sometimes mandated by state or federal law or regulation. That increase is intertwined with easily-accessible public criminal records as well as a booming background screening industry, putting such information just a few free, or relatively inexpensive, keystrokes away for those actors.[16]

The remainder of this essay puts *Gundy* to the side and considers the line between civil (nonpunitive) and criminal (punitive) consequences. Part I describes how the civil-criminal divide arises in a number of important contexts, with a focus on considerations set out in *ex post facto* doctrine. Part II discusses several Supreme Court cases that hint at a growing recognition of shifting realities that might, in turn, shift outcomes at the civil-criminal dividing line. Finally, Part III flags several of the most significant changed realities and briefly discusses how courts might integrate, and in some cases already have integrated, these new realities when determining if a consequence is civil or criminal.

I. THE CURRENT DOCTRINAL LINE(S) BETWEEN CIVIL AND CRIMINAL CONSEQUENCES

The division of consequences into "civil" and "criminal" categories, with an array of constitutional protections applicable only on the criminal side of the divide, suggests a firm binary. However, that dividing line is far from clear. As Carol Steiker has observed, judicial attempts to "to identify 'punishment' so as to make our two-track procedural system work . . . ha[ve] been conceptually muddled, to say the least."[17] The result is a patchwork of approaches that depends on the context of the case. For example, in cases challenging various state and federal sex offender registration and notification provisions, courts have considered the civil-criminal line under the Ex Post Facto Clause[18] and the Eighth Amendment's prohibition against cruel and unusual punishment.[19] Civil forfeiture has withstood challenge and been deemed nonpunitive under the Double Jeopardy Clause.[20] In a growing body of caselaw related to consequences ranging from deportation to loss of pension

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[16] *See infra* notes 33–37, and accompanying text.

[17] Steiker, *supra* note 15, at 781. *Cf. id.* at 814 ("[T]he justifications for a criminal-civil divide as I have construed them suggest that we should strive for a binary system rather than a middleground—even if that seems harsh (to either the state or the defendant) in borderline cases."); Joshua Kaiser, *We Know It When We See It: The Tenous Line Between "Direct Punishment" and "Collateral Consequences,"* 59 HOW. L.J. 341, 366 (2016) ("*Padilla v. Kentucky* shattered any semblance of clarity in the direct-collateral distinction, and lower courts are still reeling.").

[18] *See, e.g.*, Smith v. Doe, 538 U.S. 84, 89 (2002); Kansas v. Hendricks, 521 U.S. 346, 370–71 (1997) (challenges by individuals convicted before the effective date of the relevant SORNA).

[19] Millard v. Rankin, 265 F. Supp. 3d 1211, 1223 (D. Colo. 2017), *appeal filed*, No. 17-1333 (10th Cir. Sept. 21, 2017).

[20] United States v. Ursery, 518 U.S. 267, 270–71 (1996).

benefits, courts have confronted the civil-criminal divide in ruling on individuals' claims that their lawyers' failure to advise them about that particular consequence of their conviction or to plea bargain to avoid its imposition violated the Sixth Amendment right to counsel.[21] Related cases examine judicial failure to advise a defendant about a consequence of a guilty plea as a potential due process violation.[22]

These many doctrinal tests that courts employ to grapple with the line between a civil and criminal consequence, as well as the robust scholarly debate about how to define "punishment,"[23] are beyond the scope of this brief essay. Suffice it to say that, had the *Gundy* Court fashioned a specific test for criminal law delegation, it likely would have used an Ex Post Facto Clause analysis to confront the threshold determination of whether the federal SORNA consequence at issue in that case was criminal (punitive) or rather civil (nonpunitive).[24] Although the Court has not examined the federal SORNA for these purposes, it undertook such an analysis of Alaska's Sex Offender Registration Act (SORA) in *Smith v. Doe*, and did so under the Ex Post Facto Clause. Further, the considerations in that analysis are relevant to other, non-Ex Post Facto Clause cases involving the civil-criminal line.[25]

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[21] *See generally* MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW POLICY & PRACTICE 251–306 (2018–19 ed.) (examining the scope of the Sixth Amendment obligations of counsel before and after *Padilla*); *see also* Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2656–68 (2013).

[22] LOVE, ROBERTS & LOGAN, *supra* note 21, at 299–304.

[23] *See, e.g.*, Steiker, *supra* note 15, at 799 (describing the need to define "punishment" to "explain what it is about the distinguishing features of punishment that calls for a special procedural regime (whatever the contingent particulars of that regime may be)."); s*ee also* Brian M. Murray, *Are Collateral Consequences Deserved*, 95 NOTRE DAME L. REV. (forthcoming Jan. 2019) (manuscript at n.4). ("[E]ven if collateral consequences are not *criminal* punishment by classification, they can still be punitive.").

[24] In *Gundy* itself, this would not have been a difficult question, as Gundy was challenging his conviction under a portion of the federal SORNA that allowed for a 10-year prison sentence for failure to register. *Gundy*, slip op. at 4–5 (Gorsuch, J., dissenting). Although Justice Gorsuch did not focus on a specific criminal nondelegation test in his *Gundy* dissent, he began that dissent by pointing out how the SORNA delegation at issue "purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens" and how SORNA was a "law[] restricting the liberty of this group[.]" *Id*. at 1 (describing SORNA as a "criminal code" three times in dissenting).

[25] *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 369 (1997) ("Our conclusion that the [Sexually Violent Predator] Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims."); Millard v. Rankin, 265 F. Supp. 3d 1211, 1226 (D. Colo. 2017), *appeal filed*, No. 17-1333 (10th Cir. Sept. 21, 2017) (applying seven factors from Supreme Court's *ex post facto* test for punitive "effect" in Eighth Amendment analysis); s*ee also* Steiker, *supra* note 15, at 819 ("Recall that *Mendoza-Martinez*, listed seven 'factors' as generally applicable to determinations of whether putatively civil proceedings are really criminal for all purposes."); David Singleton, *What is Punishment?: The Case for Considering Public Opinion Under* Mendoza-Martinez, 45 SETON HALL L. REV. 435, 439 (2015) (stating that the *Mendoza-Martinez*, "framework has been used in a variety of contexts to determine whether statutory sanctions impose punishment").

In 2003 in *Smith v. Doe*, the Supreme Court ruled that Alaska's SORA was "a civil, nonpunitive regime."[26] As such, its application to individuals convicted before its effective date did not violate the Ex Post Facto Clause.[27] To arrive at this conclusion, the Court applied a two-part test. First, courts must ask whether the legislature intended the law to be punitive.[28] If so, it would be a criminal law that could not be applied retroactively (and to which all other relevant procedures for criminal cases would presumably apply, although those were not at issue in *Smith*).[29] If the legislature instead intended to "enact a regulatory scheme that is civil and nonpunitive," courts must proceed to the second part of the test and ask whether—by the "clearest proof"—"the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil."[30] For this "in effect" prong, courts can refer to the seven factors drawn from its earlier decision, *Kennedy v. Mendoza-Martinez*, as non-exclusive and non-dispositive "guideposts."[31] These factors ask whether, "in its necessary operation, the regulatory scheme"[32]: "involves an affirmative disability or restraint"; "has historically been regarded as a punishment"; "comes into play only on a finding of scienter"; operates to "promote the traditional aims of punishment—retribution and deterrence"; applies to behavior that "is already a crime"; is rationally connected to "an alternative purpose" other than punishment; and "appears excessive in relation to the alternative purpose assigned."[33] In *Smith*, the Court found nonpunitive intent and nonpunitive effect.

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[26] Smith v. Doe, 538 U.S. 84, 96 (2002). There are two *ex post facto* clauses in the Constitution. U.S. CONST. ART. 1, §§ 9–10. Art. 1, § 9 prohibits Congress from passing any laws which apply *ex post facto*, while Art. 1 § 10 (the relevant provision in *Smith*) applies to state passage of any such laws. *Id.*

[27] *Smith*, 538 U.S. at 105.

[28] *Id.* at 92.

[29] *Id.*

[30] *Smith*, 538 U.S. at 92 (internal quotations omitted). *Cf.* Donald Dripps, *The Exclusivity of the Criminal Law: Toward a "Regulatory Model" of, or "Pathological Perspective" on, the Civil-Criminal Distinction*, 7 J. CONTEMP. LEGAL ISSUES 199, 211 (1996) (noting the danger of the government attempting to circumvent procedural safeguards of the criminal process by "rechristen[ing] . . . crimes as 'administrative violations'").

[31] *Smith*, 538 U.S. at 97 (citing *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963)) (noting how these seven factors "migrated into our *ex post facto* case law from double jeopardy jurisprudence, [and] have their earlier origins in cases under the Sixth and Eighth Amendments, as well as the Bill of Attainder and the *Ex Post Facto* Clauses").

[32] *Id*.

[33] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963); *see also* Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 387 (2018) (describing *Mendoza-Martinez* as "the leading case explaining how judges should decide whether a particular statutory consequence imposed on someone as a result of their conduct "is penal or [, instead,] regulatory in character").

Since the Court decided *Smith*, a lot has changed. This includes changes to some jurisdiction's SORAs that renders them more punitive in effect than previously,[34] but goes far beyond SORA provisions. There has been a steep uptick in the number and scope of other so-called collateral consequences of criminal convictions, in the form of a myriad of barriers to employment, housing, education, occupational licensing, and harsh consequences relating to immigration and parental rights, to name just some.[35] At the same time, technological advances have contributed to the proliferation of data collection and sale, leading to "a bustling economy that operates largely in the shadows, and often with few rules."[36] Many data aggregators deal in criminal records, allowing public access to integrated, nation-wide information that would have been largely inaccessible until quite recently. State governments also maintain criminal record databases that are publicly-accessible and free or cheap.[37] "Further, the 9/11 terrorist attacks and ensuing security fears increased the demand for publicly available criminal records."[38] These current avenues of and demand for information stand in stark contrast to the recent past, when it was necessary to travel to the courthouse to view that jurisdiction's public criminal records.[39]

The next Part describes the Supreme Court's growing awareness of these shifting realities of the consequences that flow from a criminal conviction.

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[34] *See, e.g.*, Does v. Snyder, 834 F.3d 696, 701–05 (6th Cir. 2016).

[35] *See* LOVE, ROBERTS & LOGAN, *supra* note 21, at ch. 2; *see also* Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 120–21 (2009) ("[C]ourts categorize many other severe consequences as collateral, including involuntary civil commitment, sex-offender registration, and loss of the right to vote, to obtain professional licenses, and to receive public housing and benefits.").

[36] Steven Melendez & Alex Pasternack, *Here are the Data Brokers Quietly Buying and Selling Your Personal Information*, FAST COMPANY (Mar. 2, 2019), https://www.fastcompany.com/90310803/here-are-the-data-brokers-quietly-buying-and-selling-your-personal-information; *see generally* Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321 (2015).

[37] *See, e.g.*, *Maryland Judiciary Case Search*, MD. JUDICIARY**,** http://casesearch.courts.state.md.us/inquiry/inquiry-index.jsp (last visited Aug. 17, 2019) (providing "public access to the case records of the Maryland Judiciary").

[38] Jeffrey Selbin, Justin McCrary, & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1, 9 (2017).

[39] Of course, some of these realities did not stop Justice Kennedy, albeit writing more than fifteen years ago, from describing public access to on-line SORA information as "more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality." Smith v. Doe, 538 U.S. 84, 99 (2002).

II. HINTS OF A SHIFTING CIVIL-CRIMINAL LINE?

Although the Supreme Court has leaned heavily towards "civil" designations when determining the nature of particular consequences,[40] it has recently recognized current realities that may shift which consequences fall on which side of the line. Although not involving analyses under the Ex Post Facto Clause, these cases offer hints of a shifting civil-criminal line that are relevant in a variety of contexts. Take, for example, *Padilla v. Kentucky*, a 2010 ineffective assistance of counsel case that declined to determine whether deportation was a "direct" or "collateral" consequence. Instead, the Court stated this was "a question we need not consider in this case because of the unique nature of deportation."[41] Despite this statement and its recognition of earlier decisions that categorized immigration removal proceedings as "civil in nature," the Court detailed how immigration law has become increasingly harsh—with far more avenues to deportation and far fewer opportunities for relief from deportation than in the recent past. The Court characterized deportation as "a particularly severe 'penalty'" that is "intimately related to the criminal process."[42] All of this made it "most difficult" for the Court—and notably "even more difficult" for noncitizen criminal defendants—to "divorce the penalty from the conviction in the deportation context."[43] For that reason, the Court held that defense counsel must advise clients about the deportation consequences of a conviction in order to meet minimum standards of competency under the Sixth Amendment.[44]

Seven years later, Justice Roberts wrote for a 6-2 Court in *Lee v. United States* and drew heavily on *Padilla*'s characterization of deportation as "sometimes the most important part . . . of the *penalty* that may be imposed on noncitizen defendants who plead guilty to specified crimes."[45] The Court found that Lee's conviction and

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[40] *See, e.g.*, INS *v.* Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (holding that removal proceedings are civil in nature); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366 (1984) (holding that federal statute providing forfeiture mechanism for firearms "is not an additional penalty for the commission of a criminal act, but rather is a separate civil sanction, remedial in nature [and thus]" is not barred by the Double Jeopardy Clause). *Cf.* Turner v. Rogers, 564 U.S. 431, 448, (2011) ("We . . . hold that the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year).").

[41] Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

[42] *Id.* (quoting Fong Yue Ting v. United States, 149 U.S. 698).

[43] *Id*. at 365–66 (quoting INS v. Lopez–Mendoza, 468 U.S. at 1038).

[44] *Id.* at 374.

[45] Lee v. United States, 137 S. Ct. 1958, 1968 (2017) (quoting *Padilla*, 559 U.S. at 364) (emphasis added). For a description of another groups of cases where the Court has attempted to straddle the civil-criminal divide, *see* Steiker, *supra* note 15, at 798–99 (discussing civil forfeiture and

sentence should have been vacated because Lee showed that avoiding deportation was his main priority and thus proved that he was prejudiced by his attorney's failure to advise him that his guilty plea would lead to automatic deportation.[46] The decision acknowledged the importance of how a defendant experiences severe consequences of a conviction, separate and apart from any legislative (or judicial) declaration of the civil or criminal nature of that consequence.

Or consider, in the same year as *Lee*, the Supreme Court's unanimous invalidation of a North Carolina law that made it a felony for individuals subject to sex offender registration "to access a commercial social networking Web site . . . know[ing] that the site permits minor children to become members or to create or maintain personal Web pages."[47] Although a First Amendment analysis, *Packingham v. North Carolina* noted the shifting civil-criminal divide. First, Justice Kennedy stated:

> While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express our-selves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.[48]

While referring to revolution in the nature of places for the exchange of views, these words are also relevant to the increasingly obsolete nature of the Court's characterization of sex offender registration and some other consequences as civil and nonpunitive "in effect." On this front, although "not an issue before the Court," *Packingham* noted "the troubling fact that the [North Carolina] law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system."[49]

Most recently, Justice Gorsuch concurred in *Sessions v. Dimaya*, a void-for-vagueness challenge to a section of federal immigration law, and noted that:

> [T]oday's civil laws regularly impose penalties far more severe than those found in many criminal statutes[.] Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's "civil" penalties include confiscatory rather than compensatory fines,

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fine cases where "the Supreme Court has concluded that some state actions may be 'punitive' only for the purpose of invoking one or another procedural protection").

[46] *Lee*, 137 S. Ct. at 1968–69.

[47] Packingham v. North Carolina, 137 S. Ct. 1730, 1733 (2017).

[48] *Id.* at 1736.

[49] *Id.* at 1737.

> forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies.[50]

While the Supreme Court has only commented around the edges of the woefully outdated civil-criminal line, a growing number of lower federal and state courts have tackled the issue head-on, detailing shifting realities in declaring punitive consequences that might have been previously categorized as civil. While these changes are well-documented,[51] it is worth highlighting a few areas where courts have started to recognize a substantive difference in the internet age about various aspects of the human experience of punishment.[52]

III. CHANGING REALITIES AT THE CIVIL-CRIMINAL LINE

Even under existing doctrine governing the dividing line between laws that impose civil versus criminal consequences, courts should categorize more of those consequences as criminal given several current realities. First, a growing body of empirical evidence sheds light on, and often undermines, the purportedly nonpunitive public safety rationale that legislatures advance (and courts use) in categorizing a law as civil and not criminal in intent and effect. Second, there are major changes in the way people *experience* the various consequences related to a criminal conviction,[53] due to the recent proliferation of these consequences combined with technological developments that allow easy access to criminal records. For instance, public interaction with on-line information acts as a shaming mechanism that blurs the line between state and public imposition of punishment. Third, a number of consequences—such as immigration, sex offender registration, and loss of public, educational, and housing benefits—are now well-integrated into the plea bargaining and sentencing phases of the criminal process.

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[50] Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring).

[51] *See, e.g.*, LOVE, ROBERTS, AND LOGAN, *supra* note 21, at Ch. 4 (discussing various decisions finding right to counsel violations relating to a number of consequences, including immigration and sex offender registration, previously categorized as "collateral"); Wayne A. Logan, *Challenging the Punitiveness of "New Generation" SORN Laws*, 21 NEW CRIM. L. REV. 426 (2018).

[52] It is certainly possible that this increased recognition of the blurred line between punishment and a civil regulatory scheme (or between "direct" and "collateral" consequences) could make courts more reluctant to find more consequences punitive or direct, as this would lead to the full array of criminal procedural protections for those consequences.

[53] There are, of course, a number of consequences that can result from the mere fact of an arrest, even without conviction. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820–25 (2015).

A. *Empirical Evidence About Whether Laws Advance (or Hurt) Public Safety*

A central and recurring theme in cases analyzing whether a particular law or regulation imposes punishment, and is thus criminal, is that advancing public safety is "a legitimate nonpunitive purpose."[54] Indeed, a "rational connection to a nonpunitive purpose is a most significant factor in [the] determination that the statute's effects are not punitive."[55] In *Smith v. Doe*, for example, the Court found that "alerting the public to the risk of sex offenders in their community" was a legitimate nonpunitive purpose of public safety.[56] Distinguishing between a public safety purpose and a punitive purpose is, in itself, a complex definitional issue.[57] But putting aside that larger question, and assuming that such a distinction can be neatly made, what should courts do when there is no empirical evidence that the legislature's purported public safety rationale for a particular scheme is, in fact, making the public safer? Even more to the point, what if that evidence shows that the scheme actually diminishes public safety?

These are not theoretical questions. Such empirical evidence now exists, and courts have taken note. For example, in a significant recent case, *Does v. Snyder*, the Sixth Circuit held that Michigan's SORA retroactively imposed punishment in violation of the Ex Post Facto Clause.[58] While the court documented significant differences between the Michigan law and the federal SORNA that the Supreme Court examined in *Smith*, it also called into question *Smith*'s reliance on studies finding recidivism rates of individuals convicted of sex offenses 'frightening and high.'''[59] Instead, *Snyder* cited a "study suggest[ing] that sex offenders (a category that includes a great diversity of criminals, not just pedophiles) are actually *less* likely to recidivate than other sorts of criminals."[60] This related directly to the *Smith*

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[54] Smith v. Doe, 538 U.S. 84, 102–03 (2002).

[55] *Id*. at 102 (internal quotation and citation omitted)

[56] *Id*. at 103.

[57] *See* Murray, *supra* note 23, at n.16 (noting how "pursuing public safety is not *exclusively a* regulatory goal" but instead "underlies the theory of incapacitation, which is a traditional purpose for punishment . . . [and] might be considered a secondary effect of deterrence and rehabilitative theory"). *Cf.* John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 675–76 (2012) ("In its early criminal-civil distinction cases, the Supreme Court seemed to assume that everyone knew what the purpose of punishment was, and . . . [i]n some cases, the Court focused on . . . whether the sanction truly furthered the non-punitive purpose it purported to serve.").

[58] Does v. Snyder, 834 F.3d 696, 705–06 (6th Cir. 2016).

[59] *Id*. at 704, (quoting *Smith*, 538 U.S. at 103).

[60] *Id*. (citing LAWRENCE A. GREENFIELD, U.S. DEP'T OF JUST., RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003)). For a discussion of the problematic use of recidivism rates in the SORA context, see Logan, *supra* note 51, at n.10; s*ee also* SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS: AN EMPIRICAL EVALUATION (Wayne A. Logan & J.J. Prescott, eds., Cambridge Univ. Press, forthcoming 2020).

Court's finding that the "danger of recidivism . . . is consistent with the regulatory objective" of the SORNA.[61] But the *Snyder* opinion did not stop there. It flagged, as "[e]ven more troubling":

> evidence in the record supporting a finding that offense-based registration has, at best, no impact on recidivism. In fact, one statistical analysis in the record concluded that laws such as SORA actually *increase* the risk of recidivism, probably because they exacerbate risk factors for recidivism by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities.[62]

Perhaps most significantly, on the issue of empirical evidence about public safety, *Snyder* noted "no evidence in the record" of "any positive effects" to counterbalance the statute's "unclear" efficacy.[63] Further, "Michigan has never analyzed recidivism rates despite having the data to do so."[64] The court also remarked that the requirement that registrants make "frequent, in-person appearances before law enforcement . . . appears to have *no relationship to public safety at all*."[65]

The *Snyder* court's examination of the Michigan legislature's purported purpose in passing and amending the SORA over the years under the harsh light of the lack of evidence, countering proof, and even failure to analyze existing evidence of public safety effects raises an interesting issue for other courts examining—and litigants challenging or defending—other consequences that skate close to the civil-criminal line. What other empirical evidence exists, or could be developed, to test a legislature's stated nonpunitive intent and the actual effect of the law?

For example, federal law disqualifies any student convicted of possession of a controlled substance while enrolled in a higher education institution and receiving any grant, loan, or work assistance from receiving federal financial aid for one year for a first offense.[66] Since the federal controlled substances schedule includes marijuana,[67] a student convicted of possession of a small amount marijuana loses federal aid absent proof of rehabilitation.[68] In this example, at least two pieces of

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[61] Smith v. Doe, 538 U.S. 84, 102 (2002).

[62] *Snyder*, 834 F.3d at 704–05 (citing J.J. Prescott & Jonah E. Rockoff, *Do Sex offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161 (2011)).

[63] *Id.* at 705.

[64] *Id*.

[65] *Id.* (emphasis added).

[66] 20 U.S.C. § 1091(r)(1) (2015).

[67] 21 U.S.C. § 812 (2018).

[68] 20 U.S.C. § 1091(r)(2)(A)–(B)(2015); 34 C.F.R. § 668.40(d)(2006) (specifying requirements for approved drug treatment programs for proof of rehabilitation).

empirical evidence might help determine if the effect of the law crossed over the punitive line. First, there is well-developed evidence that black individuals are almost four times more likely to be arrested for marijuana possession than white individuals, despite long-standing public health studies showing similar rates of use across all ages in both groups.[69] Second, there is research "show[ing] that education . . . cuts the likelihood of returning to prison within three years by over 40 percent"; other research connects postsecondary education to labor market success.[70] Putting these two things together would support a claim (as part of the "in effect" inquiry in an *ex post facto* analysis, for example) that the disqualification law advances a punitive—not public safety—purpose and is excessive with respect to any nonpunitive purpose.

In an interesting development, some jurisdictions have declined to adopt certain aspects of the strict standards set out in the federal SORNA in their state SORAs, risking the loss of ten percent of their federal criminal justice funding.[71] One of the federal requirements is to include juveniles convicted of certain sex offenses on the state registry for life.[72] New York State rejected this requirement, in part because such registration was not necessary for public safety. According to a state spokesperson, "New York believes that our present laws and risk assessment method provide our citizens with effective protection against sexual predators."[73] Indeed, research shows that children and teens adjudicated delinquent of sex offenses have particularly low recidivism rates and that registration imposes significant harm that includes barriers to education, employment, and housing, all of which potentially

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[69] AM. CIV. LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE (June 2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf

[70] U.S. DEP'T OF EDUC., BEYOND THE BOX: INCREASING ACCESS TO HIGHER EDUCATION FOR JUSTICE-INVOLVED INDIVIDUALS 1 (2016) (citing LOIS M. DAVIS ET AL., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS (Rand Corp. 2013), http://www.rand.org/pubs/research_reports/RR266.html; ANTHONY P. CARNEVALE, NICOLE SMITH & JEFF STROHL, RECOVERY: JOB GROWTH AND EDUCATION REQUIREMENTS THROUGH 2020 (Geo. Pub. Pol'y Inst., Ctr. on Educ. & Workforce, 2013), https://cew.georgetown.edu/wp-content/uploads/2014/11/Recovery2020.FR_.Web_.pdf)).

[71] 34 U.S.C. § 20927(a)(2017) (setting forth 10 percent funding reduction for jurisdictions that fail to substantially implement Title I of the Adam Walsh Child Protection and Safety Act of 2006 (federal SORNA)); 42 U.S.C. § 3751(a) (2017) (establishing Bryne JAG program). For details about various jurisdictions' SORNA implementation status, see *SORNA Implementation Status*, OFF. SEX OFFENDER SENT'G, MONITORING, & TRACKING (last visited Aug. 22, 2019), https://smart.gov/sorna-map.htm.

[72] 34 U.S.C. § 20911 (2017) (including juveniles convicted of certain offenses); 34 U.S.C. § 20915 (2017) (setting out registration for the life of the offender "if the offender is a tier III sex offender" with some possibility for reduction of time after 25 years).

[73] Dylan Scott, *States Find SORNA Non-Compliance Cheaper*, GOVERNING (Nov. 7, 2011), https://www.governing.com/blogs/fedwatch/States-Find-SORNA-Non-Compliance-Cheaper.html.

increase recidivism rates.[74] Given this research, there is a strong argument that juvenile registration is effectively punitive.[75] Since jurisdictions commonly offer public safety as the nonpunitive rationale for their SORA, it seems that evidence of harm to public safety for juvenile registration might offer the type of "clearest proof" necessary to demonstrate that "the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil."[76]

In the area of employment, a number of studies about the efficacy of criminal record-based licensing restrictions may undercut legislative claims that such restrictions are nonpunitive because they promote better and safer goods and services. As a Department of Treasury report described,

> A wide range of studies have examined the question of whether licensing improves the quality of goods and services, as would be the case if licensing successfully limited the practice of an occupation to high-quality practitioners. . . . Overall, the empirical research does not find large improvements in quality or health and safety from more stringent licensing. In fact, in only two out of the 12 studies was greater licensing associated with quality improvements.[77]

Finally, in a recent letter introducing its report on collateral consequences, the United States Commission on Civil Rights stated that "[v]alid public safety bases support some collateral consequences, such as limitations on working with children for people convicted of particular dangerous crimes. Many collateral consequences, however, are unrelated either to the underlying crime for which a person has been convicted or to a public safety purpose."[78]

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[74] HUM. RTS. WATCH, RAISED ON THE REGISTRY 1 (May 2013), https://www.hrw.org/sites/default/files/reports/us0513_ForUpload_1.pdf.

[75] *Cf.* New Jersey *ex rel.* C.K., (A-15-16) (077672) (N.J. 2018) (finding that New Jersey SORA subsection setting out "irrebuttable presumption that juveniles . . . are irredeemable, even when they no longer pose a public safety risk and are fully rehabilitated" is invalid because it "takes on a punitive aspect that cannot be justified by [the New Jersey] Constitution").

[76] Smith v. Doe, 538 U.S. 84, 92 (2002) (internal quotations omitted).

[77] COUNCIL OF ECON. ADVISERS & DEP'T OF LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 16, 58 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf (listing 12 studies on licensing in areas including teaching, dentistry, and building contracting); s*ee also* Stephen Slivinski, *Turning Shackles Into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform*, 2016-01 CTR. STUD. ECON. LIBERTY ARIZ. ST. U. 2 (2016) ("This study estimates that between 1997 and 2007 the states with the heaviest occupational licensing burdens saw an average increase in the three-year, new-crime recidivism rate of over 9%.").

[78] U.S. COMM'N ON CIV. RTS., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION AND THE EFFECTS ON COMMUNITIES, Letter of Transmittal (2019).

Increasing concern about the effects of so-called collateral consequences of a criminal record has driven increasing research in a variety of areas, including those of registration, employment, and licensing discussed above. Whatever the ultimate conclusion is with respect to a particular consequence, research has exposed the fallacy of a number of claims that rely on a public safety rationale. With this growing body of research, courts should apply increasing scrutiny to the purported nonpunitive rationale of consequences based on a criminal conviction.

B. *The Experience of, and Public Involvement in, Punishment*

Technology has changed a lot of things about the criminal legal system.[79] As described above, ease of access to criminal records—combined with an unprecedented rise in laws, regulations, and policies mandating or allowing use of those records in decision-making processes—is a major consideration at the increasingly blurred line between civil and criminal consequences.[80] These changes mean that individuals with criminal convictions experience more consequences than ever before, despite believing their case is finished once they complete any jail or prison time, probation, or other condition that the judge imposed at sentencing. In short, the way individuals experience punishment is different, and harsher. Technology has also led to more public involvement in inflicting consequences of a conviction, in what appears to be a return to practices of public shaming that have deep historical roots in punishment.[81]

Recall that in *Packingham*, the Supreme Court found it "troubling" that North Carolina's law restricting internet use "imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system."[82] One federal district court judge found *Packingham*'s "observation [about severe restrictions] significant" in its evaluation of Colorado's SORA.[83] While *Millard v. Rankin* is currently on appeal to the Tenth Circuit, the trial court made several interesting observations in finding that Colorado's SORA as applied to the three plaintiffs violated the Eighth Amendment's Cruel and Unusual Punishment Clause as well as substantive due process protections.[84] First, threaded throughout the opinion is recognition—informed by testimony at hearings

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[79] Perhaps the most prominent (and critiqued) example is how many jurisdictions now use algorithms to help with bail determinations and other assessments of risk. For an excellent recent article examining such assessments, see Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218 (2019).

[80] *See supra* notes 22–26 and accompanying text.

[81] *Smith*, 538 U.S. at 97–99.

[82] Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

[83] Millard v. Rankin, 265 F. Supp. 3d 1211, 1228 (D. Colo. 2017), *appeal filed*.

[84] *Id.* at 1232.

in the case—of the realities of the actual experience of sex offender registration, and particularly notification, in the data age. For example, *Millard* noted how "Justice Kennedy's words [in *Smith*] ring hollow that the state's website does not provide the public with means to shame the offender when considering the evidence in this case." What *Smith* "did not foresee, [was] the development of private, commercial websites exploiting the information made available to them. . . . The justices did not foresee the ubiquitous influence of social media."[85] *Millard* devoted significant attention to the public shaming aspects of Colorado's SORA, describing them as different in kind from 2003 when the Supreme Court considered shaming in *Smith* and weighing them heavily on the scale of punitive effect.[86] Second, *Millard* detailed how "the plaintiffs have shown . . . [that] the public has been given, commonly exercises, and has exercised against these plaintiffs the power to inflict punishments beyond those imposed through the courts."[87]

Smith v. Doe reveals how the Supreme Court views the line between shaming and (nonpunitive) non-shaming consequences to be one of quantity as well as quality. For example, the Court noted how Alaska's SORA "Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record."[88] Also noteworthy was that **"**[t]he Court of Appeals identified only one incident from the 7-year history of Alaska's law where a sex offender suffered community hostility and damage to his business after the information he submitted to the registry became public."[89] These findings stand in stark contrast to the situation in *Millard*, some fourteen years later, under an admittedly more expansive Colorado statute. Here, the court described non-party witness testimony that "established that registered sex offenders and their families and friends face a known, real, and serious threat of retaliation, violence, ostracism, shaming, and other unfair and irrational treatment from the public, directly resulting from their status as registered sex offenders, and regardless of any threat to public safety."[90]

Millard also introduced an interesting perspective relating to this shaming: "As shown by the experience of these plaintiffs and the experience of others who have testified, the effect of publication of the information required to be provided by registration is to expose the registrants to punishments inflicted not by the state *but by their fellow citizens*."[91] Other courts, including *Smith*, have "acknowledged that

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[85] *Id.* at 1226.

[86] *Id.*

[87] *Id.* at 1235.

[88] Smith v. Doe, 538 U.S. 84, 99 (2002).

[89] *Id.* at 100.

[90] *Millard*, 265 F. Supp. 3d at 1222–23.

[91] *Id.* at 1226 (emphasis added).

[on-line] notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity," but characterized this as "attendant humiliation [that] is but a collateral consequences of a valid regulation" that has public safety as its true purpose and effect.[92]

In *Smith*, Justice Kennedy also noted that historical shaming punishment involved either "direct confrontation between the offender and the public" in "face-to-face shaming" or formal expulsion from the community.[93] Post-*Smith* courts—including the Supreme Court in *Packingham*—seem to have a better understanding of the power of on-line dissemination of information, due to the central role it plays in so many aspects of everyday life and the ways in which at least some members of the public will make use of that information. Even where a legislature only intended to supplement public safety by offering accurate information to the public,[94] those intentions are overtaken by current knowledge about vigilantism and other direct confrontations of individuals on registries, or with other forms of widely-disseminated criminal history information. It is this current reality that should inform the view of courts undertaking current analyses of consequences at the civil-criminal line.

A number of scholars have proposed ways that courts can better account for individuals' actual experiences of particular consequences, either to determine if a consequence is punitive or for some other doctrinal purpose. For example, David Singleton has suggested that courts "consider public opinion regarding whether a sanction is punitive" in undertaking the "in effect" prong of *ex post facto* analyses.[95] Carol Steiker would have courts ask, in determining if a particular state action is punishment and thus subject to procedural protections: "what is the *effect* of the state's action on the individual?" and "what would the community *understand* the state's action to mean?"[96] In a critique of the restrictive scope of protections for prisoners under the Supreme Court's interpretation of the Cruel and Unusual Punishment and Due Process Clauses, Margo Schlanger "argue[s] that constitutional doctrine should . . . center on the objective experience of incarcerated prisoners, rather than the culpability of their keepers."[97]

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[92] *Smith*, 538 U.S. at 99.

[93] *Id.* at 98 (applying the *Mendoza-Martinez* factor that asks whether "the regulatory scheme . . . has been regarded in our history and traditions as punishment").

[94] *See, e.g.*, *id.* at 94 (describing how the Alaska legislature determined that "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety").

[95] Singleton, *supra* note 25, at 439; *see also id*. at 465–72 (describing study on public opinion and punishment).

[96] Steiker, *supra* note 15, at 811.

[97] Schlanger, *supra* note 33, at 631.

Current SORAs may offer the strongest case for reconsideration of prior nonpunitive characterizations. The shaming aspects of SORAs set them apart from many other consequences. Still, attention to how an individual experiences the various consequences related to a criminal case are not unique to SORAs. Mandatory barriers in occupational licensing can cause a person to lose their chosen field of work. Mandatory deportation tears individuals from the only family and country they know. Losing financial aid can end a person's educational experience, with profound effects on future employment and financial prospects. Individuals will often experience these consequences as punitive—often as more punitive than any sentence imposed in the criminal case[98]—even if courts have not characterized them as such.

C. *The Integration of "Collateral" Consequences into the Plea Bargaining and Sentencing Phases of the Criminal Process*

As discussed above, the Supreme Court held in *Padilla v. Kentucky* that defense attorneys have a Sixth Amendment duty to advise noncitizen criminal defendants about the deportation consequences of a conviction.[99] A spate of trainings and changes to office policies and practices followed this significant constitutional pronouncement.[100] As defense and prosecution knowledge of immigration consequences developed, plea bargaining to avoid harsh immigration consequences became more common.[101]

The Supreme Court has **"**long recognized that the negotiation of a plea bargain is a critical phase of litigation demanding the effective assistance of counsel**"**[102] and more recently that counsel who chooses to plea bargain must be effective in that

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[98] *See, e.g.*, Lee v. United States, 137 S. Ct. 1958, 1969 (2017) ("Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.").

[99] *See supra* notes 27–30 and accompanying text (discussing *Padilla v. Kentucky*, 559 U.S. 356 (2010)).

[100] *See* Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445, 1470 (2016).

[101] Press Release, Off. of the St. Atty. for Baltimore City, States Attorney Marilyn Mosby Instructs Her Office to Strongly Consider Prosecutorial Discretion for Cases Involving Immigrant Defendants, Witnesses, and Victims (May 4, 2017), *available at*: http://tinyurl.com/yanatg4b. Some offices and individual lawyers already integrated advisement about and advocacy around immigration, as well as other "collateral" consequences, into their practice. However, this was concentrated in certain jurisdictions and certainly became more widespread in the wake of *Padilla*.

[102] Padilla v. Kentucky, 559 U.S. 356, 373 (2010).

process.[103] While the Court has not considered whether bargaining to avoid serious collateral consequences is required under the Sixth Amendment, some state and lower federal courts have found such a duty.[104] Further, the integration of collateral consequences into plea bargaining is consistent with constitutional, ethical, and professional standards. For example, professional standards recommend that defense counsel bargain about collateral consequences that are significant to a client's interests, since plea discussions may be a criminal defendant's first and only opportunity to avoid these consequences.[105]

There has also been significant movement toward integration of collateral consequences at sentencing. Both the American Bar Association's Criminal Justice Standards and the Uniform Collateral Consequences of Conviction Act would grant courts the authority to relieve or dispense with applicable collateral consequences at sentencing.[106] The recently-approved update to the Model Penal Code's Sentencing provisions has a new Article devoted to collateral consequences.[107] With increased attorney awareness of immigration and other serious consequences of convictions comes increased advocacy around those consequences at sentencing.

The Court in *Padilla* based its decision, in part, on how "deportation is . . . intimately related to the criminal process" and "[o]ur law has enmeshed criminal convictions and the penalty of deportation."[108] The holding in the case led to further enmeshment, in the form of mandated advisement about deportation prior to a guilty plea and plea bargaining and sentencing that accounts for deportation. A variety of other serious "collateral" consequences—including sex offender

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[103] Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012) (**"**During plea negotiations defendants are 'entitled to the effective assistance of competent counsel.'**"**) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970))**.**

[104] *See, e.g.,* Commonwealth v. Marinho, 981 N.E.2d 648 (Mass. 2013) (relying on state constitutional grounds but citing *Padilla, Frye*, and *Lafler* in holding that counsel violated the first prong of *Strickland*'s ineffective assistance of counsel test when counsel failed to bargain for a disposition that would avoid deportation consequences of a conviction).

[105] *See* ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 4-1.3 (4th ed. 2015) (**"**[A]t all stages of a criminal representation and on all decisions and actions that arise in the course of performing the defense function,**"** defense counsel has **"**a duty to consider the collateral consequences of decisions and actions, including but not limited to the collateral consequences of conviction**"**).

[106] ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons, Standard 19-2.5 (3d ed. 2004) (a sentencing judge should be authorized **"**to enter an order waiving, modifying, or granting timely and effective relief from any collateral sanction imposed by the law of that jurisdiction**"**); Uniform Collateral Consequences of Conviction Act § 10 (2010) (providing for sentencing court to issue an **"**Order of Limited Relief**"** from **"**one or more collateral sanctions related to employment, education, housing, public benefits, or occupational licensing . . . at or before sentencing**"**).

[107] Model Penal Code: Sentencing (Am. Law Inst., Proposed Final Draft, 2017).

[108] *Padilla*, 559 U.S. at 366.

registration, loss of pension benefits, occupational licensing, and housing and employment consequences—have become similarly well-integrated into the criminal process (even if not by constitutional mandate). This significant development is yet another reason to reconsider the civil-criminal divide.

CONCLUSION

In the end, *Gundy v. United States* was a disappointment for those looking for radical reconfiguration of the administrative state or even for a narrow decision finding SORNA's broad delegation to the Attorney General crossed established nondelegation doctrinal lines. But the Court is likely to revisit nondelegation and in doing so might follow Justice Gorsuch's suggestion, from his time as a judge on the Tenth Circuit, of a criminal law nondelegation test. If that happens, difficult determinations of what qualifies as "criminal" will surely follow. This term paper took off from that point, leaving *Gundy* and nondelegation behind to consider issues at the muddled line between civil and criminal, or punitive and nonpunitive, consequences.

The Supreme Court has leaned heavily towards nonpunitive designations for sanctions in a variety of contexts. However, changing realities have already led to some different outcomes in the lower federal and state courts. These changes include new and developing empirical evidence about the actual effects of various laws and regulations, whatever their legislatively-declared purpose. They also include a proliferation of so-called collateral consequences of criminal convictions at a time when technological advances have allowed broad and easy access to information about those convictions. Consequences previously categorized as "civil" or "collateral" have also become integrated into the criminal process, mainly at the plea bargaining and sentencing stages. Should the Court consider a criminal nondelegation doctrine in a future case, threshold determinations of what qualifies as "criminal" will be necessary. These new developments since the Court last considered the civil-criminal line may, in the end, shift that line.